Response to evidence from Planning Democracy regarding PE01534

PE1534/V

Introduction and summary

Planning Democracy welcomes the opportunity to respond to the submissions the committee has received with regard to PE01534 on Equal Rights of Appeal in Planning (ERA).

In what follows we would like to comment on the overall balance of submissions the committee has received before offering a response to what we consider the key arguments raised for and against ERA. We do not wish to reiterate here arguments made in our original submission but will seek to develop them in order to offer a full response to key issues raised by others.

Overall, we strongly refute key arguments presented by the Government, Planning Aid for Scotland (PAS) and Homes for Scotland (along with other house builders). Below we outline our counter arguments, presenting clear evidence to demonstrate that their arguments are flawed. We offer the Committee some recommendations to assist in resolving the disagreements raised with a view to finding a solution acceptable to all.

Our submission covers the following:

1. Summary of case studies
2. Concern about balance of submissions sought
3. The arguments made in others' evidence that we wish to comment on
4. ERA is not a panacea but it can bring substantial benefits: Why ERA is needed now
5. Recommendations

1. Summary of case studies

Our submission includes 4 case studies Canonbie, Craighouse, Viking, and An Camas Mor. We feel these cases studies demonstrate the need for ERA and are referenced throughout as evidence of our arguments. Although this evidence is not statistically representative, it provides clear examples of community perspectives on complex planning cases. It highlights the struggle that members of the public experience as they seek to engage with often long running processes. We believe that each case raises genuine public interest concerns. Consequently, we identify where we believe there would be grounds for appeal in planning terms against the decision that was made (these are summarized on pages 7-8).

2. Overall balance of submissions

We are not surprised by the polarized nature of the representations received for and against ERA. The split between public, community and those of the planning and development professions is broadly similar to the last time this issue was debated in 2005. As our petition outlined, at that time, 86% of public consultees supported introducing third party rights of appeal. The opposition (14%) was chiefly comprised of the planning and development professions. The Government was clearly persuaded by the power of their lobbying to dismiss TPRA.

Given this balance of representations in 2005, we are disappointed that the committee has limited their call for views on ERA predominantly to the 'usual suspects' in the planning and development professions. We feel this fails to seek the opinion of local communities. Planning Democracy has actively solicited provide examples of community and wider public perspectives to address this imbalance.

The balance of committee-solicited submissions reflects a persistent bias in wider debates on planning reform in Scotland. We urge the committee to consider, and deliberate on, this relative absence of wider public voices, particularly individuals and communities directly affected by planning decisions made under the new system.

3. Our response to the key issues raised

(a) Property rights vs Rights of public participation

All respondents accept that the public interest is served through public engagement in planning decisions. This is consistent with well-established principles in law, policy, and spirit of international commitments like the Aarhus Convention. We extrapolate from this that there is a widespread acceptance of a *right to participate* in planning decisions that affect people's lives.

Responses from the property industry and Planning Aid Scotland nonetheless suggest that this right is secondary to the rights of property owners in the planning system. This principle stems from a sixty-year old norm where appeal rights are considered a form of compensation for the loss of the right to develop. This principle persists, despite being widely dismissed by leading legal authorities since the 1990s, particularly in the light of the Human Rights Act and signing of the Aarhus Convention (Grant, 1999; Purdue, 2000).

Historically established rights, like those related to private property, can often appear self-evident. This reflects little more than the persistence or cultural legacy of certain practices. These, however, are not fixed and systems are constantly in evolution. The historical development of current planning practices provide examples of making planning decisions more accountable to the wider public. Examples include:

- extension of requirements for public involvement in development control decision-making;
- the requirement for public authorities to give reasons for their decisions;
- the ability to take statutory review proceedings before the courts.

It should be emphasized that these mechanisms were gradually won through the courts. Change was resisted, but these practices are now considered 'normal'. As Professor Malcolm Grant[1] (1999) concluded, third party rights of appeal seem like an inevitable further evolution of the public's rights, particularly in light of broader acceptance of the requirements of a modern participatory democracy.

In short, there is no necessary principle underpinning the continued privileging of applicants over those of other affected parties. Quite the opposite in fact. The purpose of the planning system is to ensure sustainable development that promotes the broader public interest. If we accept that all of those affected by decisions have a right to participate in those decisions then the existing inequality in appeal rights can be seen as little more than an historical anomaly that should be remedied.

As the evidence submitted by the Community Development Alliance suggests, a lack of community right to appeal is not in keeping with the current zeitgeist of land reform and community empowerment legislation. As they put it, "It would seem to be highly anomalous for this imbalance of power in the planning system to be allowed to continue at a time when the Scottish Government is so intent on devolving powers to communities in so many other respects".

(b) A question of design

We note that the majority of objections to introducing ERA relate to how it would operate effectively. We consider that the evidence from Frank Cosgrove highlights how concerns around delay might be readily addressed through the appeal process. The RTPI and others raised concern that ERA would centralize decision-making because they assume that a centrally appointed reporter would deal with the appeal. In Scotland the precedent of local review bodies already exists to suggest alternative, more local, ways around this objection.

However, we would also draw the committee's attention to the evidence presented by Professor Ellis. He outlines the flexibility of third party rights of appeal, highlighting that they can be designed in a range of different ways to achieve different purposes. As such **we would stress the potential to design a system of equal appeal rights that overcomes many of the concerns raised, most of which seem to assume that ERA would be a rather blunt instrument.**

(c) Existing opportunities to participate

Planning Democracy welcomes the Government's long-standing recognition that public participation can improve plans and decisions. We further welcome the commitment of the Government and planning professional bodies (RTPI, PAS) to ensure early and meaningful engagement in plan-making and decision-taking. We also recognize that existing efforts to ensure effective engagement can make a significant impact and could be greatly improved.

[1] Former Provost of UCL and now Chair of NHS England, Grant is a leading scholar of planning law.

The Government suggest in their evidence that they have recently sought stakeholder views on front-loading of engagement through pre-application consultation. We are unclear of which stakeholders were consulted and any research that has explored community experiences of frontloading or pre-application. The clear failings of pre-application consultation in the case of Canonbie (see appendix for all case studies) and the reservations expressed in the submission by Stockbridge Community Council suggest that pre-application public consultation is not as effective as the government argues. Furthermore, it is not clear how pre-application discussions or consultation increases public influence in major planning decisions, especially when public concerns have not been adequately addressed.

In their submission PAS acknowledge that despite existing mechanisms to participate, communities and individuals are often left frustrated by the experience. The case studies of Viking Shetland, Craighouse and An Camas Mor all clearly illustrate such frustrations. They also highlight the challenges that confront individuals and communities seeking to engage with a complex system. Each case study highlights that important public interest concerns were not fully addressed within existing procedures. These are not simply the frustrations of parties who did not get what they wanted from the system. The case studies provide examples of three valid and important concerns: the process is extremely complex for *all* parties involved; failure to fully explore key issues, particularly those raised by third parties; and the lack of opportunities for scrutiny of issues and/or decisions.

That this situation persists despite nearly fifty years of experience of engaging the public in planning matters suggests that there are serious problems with the existing framework and approach. We believe that this reflects a fundamental inequality between different participants in the process. ERA would be a significant step towards remedying this inequality.

In the context of existing opportunities to participate, Homes for Scotland ask what could be gained by introducing a further round of debate into the planning process. In response we would simply answer that this argument could equally be used to question the right to appeal of the applicant who has even more opportunity than members of the public to convince decision-makers of the merits of their proposal throughout the entire process from beginning to end.

Planning Democracy view appeal rights as an acknowledgment that planning decisions are not clear-cut questions of evidence and fact, instead they are based on the difficult business of balancing competing evidence, claims and interests. Such decisions are often controversial and appeal rights provide an important means of scrutinizing them to ensure that they are made in the public interest.

(d) Lack of evidence

Responses from the property industry are quick to highlight that there is a lack of hard evidence to support the existence of a problem. Government, HOPS and the property industry assert that the current system is achieving a proper and effective balance and that frontloading of engagement has fulfilled its promise to offer communities more influence over planning decisions. Our case studies indicate that these claims are not the case.

We highlight to the committee 2 key issues:

1. **There is an absolute lack of evidence in the submissions of Government, HOPS and the property industry to support their claims;**
2. **There has been <u>no</u> attempt to review whether the changes introduced by the 2006 Planning Act to improve the public's influence have been successful.**

We also note that the current 'planning performance framework' reflects the central thrust of the planning reform agenda in prioritizing speed and the proclaimed efficiency of decision-making over the challenges of improving public understanding and engagement. Indeed, we note that there are no established means of measuring how 'meaningful' public engagement is at present. Planning authorities and developers are not effectively measured by the quality or effectiveness of their approach to engagement. As a result we question whether there is currently sufficient incentive to ensure effective engagement.

<u>We ask the Petitions Committee to refer our petition to the Local Government and Regeneration Committee where an evidenced inquiry into the efficacy of public engagement in the current planning system can be held</u>.

(e) ERA will undermine the plan-led system and the goal of frontloading

There is a strong assumption in the submissions of those opposed to ERA that its introduction would work against the valued principle of 'frontloading' engagement to ensure a 'plan-led' system. We support the holistic and visionary ambition of a plan-led system as outlined by the RTPI. We note, however, that there are very considerable challenges to effectively engaging the public at the early stage of plan preparation (which, again, nearly fifty years of professional experience and expertise has not yet resolved!).

We believe, therefore, that equalising people's rights at the stage where decisions are actually made is not contrary to a plan-led system. Planning policy and practice are fluid processes and there are times when there are gaps in the system. For example, applications are often made in the absence of an up to date local plan. The case studies provide ample illustrations of this. Important questions of both principle and detail are determined at the planning application stage and these are often made in this messy policy context. Frontloading often fails to resolve issues in these 'messy' policy moments. ERA would be a mechanism that would provide additional transparency and scrutiny of contested planning decisions.

The submissions by the property lobby suggest that members of the public are likely to seek inappropriate debate about principles that have already been settled at the plan-making stage. We believe that there may be a case, in certain situations, for preventing such principles being debated (hence the suggestion that ERA be considered particularly in cases where there is a departure from an agreed development plan). Given the much lower levels of engagement typically achieved at the plan-making stage, we feel there is a danger that this argument is used to shut down public influence and scrutiny. We do not believe it is good enough for

professionals to simply blame members of the public for being unaware of opportunities to participate in the emerging local plan for their area. Until the implications of applications/decisions become apparent few of us are sufficiently involved in all aspects of the modern world to anticipate such future challenges (and those who are, often struggle to influence plan processes that are driven by and for professional interests). **Until more effective methods are found to ensure widespread and effective engagement in plan-making, the planning *application* stage will remain a key focus of the local politics of planning and the custodians of the system have a duty to engage with the valid concerns that are raised at this stage.**

Contrary to the impression presented in submissions from Homes for Scotland and others, we emphasise it is not just members of the public who may seek to reopen debate about the principle of a development at the planning application stage. Applicants are free to submit applications that depart from the plan. In such cases there has been no prior debate about the principle of the proposed development (and indeed members of the public and others may well have been heavily involved in agreeing alternative principles). We also note that since 2009 the Government has significantly restricted the requirement for departures from the development plan to be notified to Ministers. As a result opportunities to scrutinize such cases have in fact been reduced since the advent of the planning reforms.

None of the submissions, however, consider the possibility that the credible threat of ERA would have the effect of encouraging developers to engage more openly in the plan-making and pre-application processes. An alternative option to strengthen the likelihood that applications would only be made in line with the agreed objectives of a plan would be to restrict the applicant's right of appeal. We believe that ERA is a more acceptable proposal to all stakeholders.

Overall, Planning Democracy believes that ERA could provide a mechanism for strengthening rather than undermining the plan-led system.

(f) ERA will cause delay

Arguably, the key goal of planning reform has been to speed up decision-making in response to the concerns of the development industry. The Government's Planning Performance Framework demonstrates this. Efficiency in decision-making is desirable, however, it needs to be balanced against other goals. Frank Cosgrove's evidence from the Republic Ireland suggests that ERA could be designed in such a way to minimize delay. However, a longer decision period is justified where it leads to more appropriate development in the public interest and heightened public trust that the correct decision was made. We consider a few weeks of additional scrutiny to ensure the appropriateness of a contested proposed development an acceptable step considering effects that may impact a place and community for fifty years or more. As noted above, the irritancy of such delay may also encourage developers and planning authorities to engage and seek compromise on contentious issues earlier on in the planning process.

In addition, ERA would also have the effect of reducing reliance on costly and time-consuming Judicial Reviews (JR) of decisions. JRs are also considered the only

route people might query a questionable grant of planning permission. In contrast to ERA, JR is not sufficient as a scrutiny mechanism of planning issues because it tests the appropriateness of *procedure* not the substance and merits of proposed developments.

(g) ERA will lead to vexatious appeals

Considerable and predictable concerns are raised about the potential for ERA to generate a large number of vexatious appeals without planning merit. The evidence from the Republic of Ireland presented by Professor Ellis and Frank Cosgrove suggests that such concerns are considerably overstated. As noted in our original submission, ERA can be designed in ways to prevent such instances.

The case studies are all examples of contested planning decisions. Such decisions require elected officials (or planners) to balance all relevant material considerations before coming to a judgment about where the public interest lies. This is not an objective or fact based process. Existing appeal rights recognize this and can lead to 'weak refusals' of planning permission being overturned. At present, 'weak approvals' are not subject to scrutiny. As the summary below highlights, it is possible to identify grounds of appeal in each case. The cases highlight how the scrutiny function of ERA would further test the planning merits of development.

Coal bed methane in Canonbie, Dumfries and Galloway:

This development was seemingly misrepresented during consultations which prevented full and meaningful public engagement. In substantive terms, the failure to treat this set of applications as constituting major development, so bypassing higher levels of environmental and public scrutiny, raises important public interest questions about the incremental impacts of the developments being consented to. This is compounded by the current lack of clear national policy on unconventional gas exploration and extraction, suggesting a real public interest in further scrutiny. ERA would allow these issues to be fully explored.

Craighouse, Edinburgh

This case raises important issues around existing opportunities for the public to scrutinise claims presented by applicants. There were apparent discrepancies in application documents (e.g visual material). The decision was clearly a very sensitive one, contrary to the local plans and with potentially detrimental effects on a site of considerable protected local heritage and landscape value. Yet it was considered that the discrepancies were not fully debated by those in the decision-making process.

Viking windfarm in Shetland:

This energy consent was granted approval by the Scottish Government despite objections being made by SNH and officers of the Lerwich Port Authority. The development is contrary to the local development plan. The close relationship between the council, elected officials and the developer

raise reasonable concerns about the role of the local authority in not raising formal objections themselves. The concerns raised by SNH about bird habitats highlight the potentially significant environmental impacts of this debate. Although major energy consent procedures are somewhat different from normal planning processes, it seems reasonable to conclude that there are major public interest questions raised by this development that merit further consideration. ERA would ensure such scrutiny and could also have allayed the legal challenges that will further slow this process down.

An Camas Mor

This on-going case is complex. It raises important questions about the nature of acceptable development in a national park, including important wildlife habitat and biodiversity issues. Planning permission in principle has been granted for development that lacks significant information on environmental social and economic impact, without resolving important questions about the impact and without establishing appropriate mitigation of the significant impacts the development will have on threatened wildlife for which the UK has international obligations The appropriateness of housing development at the site is also highly contested. On a more general level, the case illustrates how controversial and contested the balance of factors can be in determining planning cases. Recognising this, it is clear that there is a public interest justification in offering full and fair opportunities to scrutinise proposals. ERA would have enabled these matters to be given further scrutiny and may have forestalled subsequent legal action.

We believe that these cases illustrate the scope for ERA to test contested material considerations and help assure that the concerns surrounding a development are mitigated as far as possible. It is significant that none of the professional or development lobby submissions recognise this possibility but instead characterize third parties as barriers to the realization of development.

Whilst we accept that planning decisions should be made on the planning merits of the case (in Scotland this means the balance of ‘material considerations), we also believe that cases that generate large numbers of public representations should reasonably be subject to heightened processes of public scrutiny. We are concerned that the attitude of the development industry and others tend to contest, rather than welcome, heightened scrutiny. Our experience has led us to believe that developers fail to sufficiently recognise the negative impacts their development can bring to the environment or communities.

(h) A professional culture that undermines public participants

Following from the above, we note in submissions from the development industry and even PAS that there is a generally negative view of the capacity of the public to engage meaningfully in planning processes. We believe that this provides an important insight into the dominant culture and attitudes of Scotland’s highly professionalized planning system.

The system is undoubtedly complex. Participants in the planning process are motivated by a myriad of reasons. In our experience, members of the public face considerable challenges when they seek to participate. We feel that the development industry can be dismissive or derogatory of views which do not conform to this culture. At times people's contributions do not always fit the style, norms and practices of trained professionals. We also note with alarm the caricature presented by the development industry that the public are self-interested, NIMBY-ists (and the implicit suggestion on the other hand that the housebuilding lobby have a public interest purpose at heart) We believe that the case studies – and the previous section - show this claim to be without basis. People who participate in the planning process are motivated by a wide range of concerns and the issues they raise are often important public interest concerns (about e.g. public health, fair access to services or environmental). The attempt to sweep such concerns aside as expressions of mere NIMBY-ism are regrettable and suggest an industry that does not fully accept the value of public participation. This is not to argue that individuals and community members who participate are always right or should prevail, but their right to participate on equal terms does need to be fully acknowledged.

(i) ERA will have negative effects on economic growth and investment decisions

Persimmon melodramatically argued that ERA would contribute to 'catastrophic' effects on growth and investment in Scotland. Although not directly transferrable, the evidence from Ireland (or several Australian states) suggests that this is not the case. Moreover, ERA would pose no threat to development that clearly serves the public interest.

4. ERA is not a panacea but it can bring substantial benefits

Submissions from development and planning professionals take the view that there is nothing to be gained by ERA. Their arguments are little more than assertions of (albeit considered) opinion, mixed in some cases with a healthy dose of self-interest. They are based on no substantive evidence. This reflects a system that is driven by and for professional interests and that continues to erect substantial barriers that prevent the public from having the influence that the language of policy and legal rights promises.

None of the responses received from Government, planning professionals or developers have considered the potential benefits that ERA might have as a mechanism for:

- creating a level playing field to ensure meaningful public engagement;
- strengthening the plan-led system by the incentives that ERA at the end of the planning process would encourage;
- enhancing public trust in the planning system;
- improving plans and decisions by ensuring that complex and often highly contentious decisions are subject to the same level of scrutiny as decisions to refuse permission.

The responses received have also highlighted a pressing need to review the outcomes of planning reform from a community perspective. The decision not to pursue third party rights of appeal in 2005 was accompanied by promises of enhanced engagement through front-loading. As discussed above, there is no systematic evidence this has been delivered. Our case studies provide indications that it has not.

5. Recommendations

1. We ask that the Committee refer the petition to the Local Government and Regeneration Committee and request that they initiate an independent inquiry into experiences of the planning system from a community perspective.

2. We ask that the Committee ask the Scottish Government for further information on what information the Government holds on the experience of third parties who participate in the planning system, and how the planning system contributes to delivering the National Outcome: "We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others".

3. We ask that the Committee agree to inviting witnesses with experience of planning systems in other jurisdictions with equal rights of appeal to provide evidence to the committee.